approvals they appear to have obtained sometime after 5 July 1983. Fair copies of the approved drafts were filed only on 14 July 1983 on which date the requisite fees therefor was paid in stamps. The assistant registrar concerned thereupon signed each fair copy – each backdated to 4 July 1984 – thereby purporting to issue a certificate of non-appearance as at 4 July 1984 and purporting to enter final judgment in default of appearance.

The real question posed to the court was which came first, entering of the appearance or entering of the judgment in default. One or the other was irregularly allowed to be entered.

A distinction must be drawn between judgments or orders that are pronounced, given or made and judgments that are entered. In the case of the former the pronouncement, giving or making of the judgment or order has to take place before the judgment or order can be drawn up. Such judgments or orders take effect from the day of its date and shall be dated on the date on which it is pronounced, given or made (see O 42 r 7).

In the case of the latter the judgment to be entered has to be drawn up before it is entered (O 42 r 10(2)). Since there is no question of any pronouncement, giving or making of such a judgment and since it comes into effect on its being entered, its date has to be the date that it is entered.

In the instant case the judgment could not have been entered prior to 14 July 1983 since it was only on that date that the judgment to be entered was duly presented to the registry supported by the requisite certificate of non-appearance. The requirements of O 13 r 7 cannot be met by submitting to the proper officer a draft of the certificate. The requirement of O 42 r 10(2) cannot be met by submitting to the proper officer a draft of the order to be drawn up. The actual certificate duly executed by the certifying authority and the judgment duly drawn up has to be presented and only then may the registrar enter the judgment. The date of the judgment will be the date that the judgment was entered and cannot be backdated. If in the meantime the defendant has entered an appearance, the default judgment sought to be entered should be rejected.

In my judgment on the facts the defendants had entered their appearance prior to judgment in default having been entered. Accordingly the judgment in default which is encl 8 in the court file was irregularly allowed to be entered. It should be and is set aside.

The plaintiffs will pay the costs of and incidental to the application.

Application allowed.

Solicitors: *Zain & Co*; *Lewis & Co*.

Reported by *Ng Sheau Jiuan*

CK Tay Sdn Bhd v Eng Huat Heng Construction & Trading Sdn Bhd

HIGH COURT (JOHORE BAHRU) – ORIGINATING MOTION NO 32-2 OF 1988
ABU MANSOR J
5 OCTOBER 1988

Arbitration – Order to remit arbitrator's award back to arbitrator – Application for – Whether arbitrator failed to decide all issues referred to him – Court's discretion to remit award to be judicially exercised – Where balance of convenience lay – Merits of application

By a written agreement between the applicants and the respondents, it was agreed that C be appointed to arbitrate the numerous issues contained in the agreement. C subsequently made an award. By a notice of motion, the applicants applied that the award be remitted back to C in that he had exercised his discretion incorrectly in some of the matters referred to him for decision. The following issues were contended by the applicants: (a) C wrongly relieved the respondents of the obligation to provide a letter of indemnity despite the fact that the respondents were contractually bound to provide it; (b) C failed to decide whether or not there was any price difference resulting from the substitution of high tensile with mild steel bars; (c) C did not deal adequately on the period of delay and the quantum awarded; (d) C, by merely stating that the defects in the building will be rectified by the respondent after the other issues had been settled, had postponed the issue and not decided on it.

Held, dismissing the application:

(1) C did not relieve the respondents from having to give a letter of indemnity. The provision of a perpetual indemnity was not a term of the contract. C was correct in deciding that the letter of indemnity was not required as the consultant engineer did not object to such substitution.

(2) As to the second ground of price difference, since the applicants had not raised any objection on the substitution of mild steel bars through their consultant engineer, it was therefore no longer tenable to talk of a price difference. C was correct when he decided that there was no price difference in using the mild steel bars.

(3) As regards the third point of contention as to delay, the respondents' counsel had given reasons for C coming to such an award and the delay was explained as due to inclement weather and the applicants' alteration of the plans.

(4) On the issue of defect, this issue was a non-issue before C since the contract sum of 5% to cater for defect liability had been retained by the applicants and the complaint of defect was well after the defect liability period.

(5) Section 23 of the Arbitration Act confers a wide but limited discretion on the court to remit the award. Like all discretions, it had to be judicially exercised. Before the court can remit to the arbitrator, it had to ask what was the balance of convenience. C had not misconducted himself by failing to decide all issues referred to him and as remitting this matter to him will cause hardship to the respondents and drag this matter to no end, the balance of convenience lies in favour of the court not remitting the award back to C.

[*Editorial Note*: The applicants have appealed to the Supreme Court vide Civil Appeal No 02-4/89.]

Cases referred to

1 *Ong Guan Teck* v *Hijjas* [1982] 1 MLJ 105 (refd)
2 *Official Assignee* v *Chartered Industries of Singapore Ltd* [1978] 2 MLJ 99 (refd)
3 *Tan Toi Lan* v *Lai Kee Ying* [1975] 1 MLJ 27 (refd)

Legislation referred to

Arbitration Act 1952 s 23

CH Tok for the applicants.
Tay Bee Choo (Miss) for the respondents.

Cur Adv Vult

Abu Mansor J: By the applicants' notice of motion dated 21 January 1987 (encl 3), the applicants pray for an order that the award made between the parties to the arbitration by Ching Goo Kia dated 10 December 1987 may be remitted for consideration by the said Ching Goo Kia of the following matters referred to him, namely, matters pertaining to the letters of indemnity to be provided by the respondents; the difference in price resulting from the substitution of high tensile bars with round bars; the period of delay in the completion of the project; the provision of fire extinguishers and the defects of the buildings and the effects of its sale.

After hearing arguments of counsel, I reserved judgment to a date to be fixed.

The facts of the case as can be gathered from the affidavit of Tay Chong Keng affirmed on 21 January 1988 encl 2 are as follows. By an agreement in writing dated 27 August 1987 made between the applicants and respondents, it was agreed that one Ching Goo Kia be appointed to arbitrate the numerous issues as contained in the agreement. On 10 December 1987 the arbitrator made an award exhibited as 'B'.

It was urged on the court by Mr Tok, counsel for the applicants, that the arbitrator has exercised his discretion incorrectly in some of the matters referred to him for decision. Firstly, the allegation of the applicants is that the arbitrator relieved the respondents of the obligation to provide a letter of indemnity despite that the respondents were contractually bound to provide for the same. The applicants say that the arbitrator has in doing so acted beyond his authority. The applicants referred the court to para 2 of the applicants' manager's affidavit encl 7 dated 29 June 1988 (exh A) to the effect that a letter of indemnity had to be provided by the respondents. Counsel alleged that during the arbitration proceedings, the arbitrator waived that requirement without the consent of the applicants. He charged that since it is a term of the contract that a letter of indemnity be provided, it could not be waived unless agreed to by the parties. In doing so, counsel submitted that he had acted in excess of his authority.

Miss Tay on behalf of the respondents contended, however, that it was never a contractual obligation to provide an indemnity. This was alleged in p 4 of encl 4 that it was not part of the contract for the respondents to provide a letter of indemnity. It arose out of a request by the engineer employed by the applicants in a letter dated 20 November 1985. The contract required that high tensile steel bars be used. As high tensile steel bars were not available, mild steel bars had to be used. As a result of this change of terms to use mild steel bars, a letter of indemnity was asked for from the respondents by the consultant engineer. Counsel says the respondents did provide the letter of indemnity for 12 months from 5 June 1987 to cover the defect liability for that period. The certificate of fitness was then issued on 30 January 1987.

Respondents' counsel further contended that the arbitrator made a finding that the letter of indemnity was not required as the consultant engineer did not object to such substitution. The substitution was made in the revised plan and it was part of the contract. The acceptance was evidenced by the fact that by 17 March 1986 no more reference was made to any indemnity as the said revised plan was duly endorsed by a professional engineer.

The second complaint of the applicants of the arbitrator's award was that the arbitrator failed to decide whether or not there was any price difference resulting from the substitution of high tensile to mild steel bars. He says the question was referred to the arbitrator during the course of the proceedings but the arbitrator failed to make a decision. The applicants conceded that what the arbitrator did was to decide that since both parties did not make a claim hence no claim was allowed. The applicants' counsel says the issue was referred but no decision was made by the arbitrator.

For the respondents, it was argued that it was not true to say that the arbitrator had wrongly decided on the difference in price. She argued further that the arbitrator decided there was no difference in price in using the mild steel bar which was built to equivalent strength. Evidence was led over three days' hearing and he decided and the arbitrator was a qualified engineer.

The third ground for seeking to remit back the arbitrator's award was the period of delay referred to the arbitrator. The issue was whether or not there was a period of delay in completion. If there was such a delay then what was the quantum? Applicants' counsel contended that the arbitrator did not deal adequately with this issue. The arbitrator merely gave an amount on the assumption without any reasonable basis. Counsel said further this can be seen from these findings.

In reply counsel for the respondents refuted applicants' counsel's argument that the award was without basis. She maintained that the arbitrator's award for delay was based on the evidence of the respondents. The

delay was explained by the respondents as due to inclement weather conditions beyond the control of the respondents, and also due to the alteration of the plans required by the applicants. Hence work was delayed. The arbitrator, after giving due consideration to these factors, made an award for the delay but it was not to the applicants' satisfaction.

The last issue allegedly not correctly decided by the arbitrator was the issue of defects to the building. The applicants' complaint stems from the fact that the arbitrator merely stated that the defects will be rectified by the respondents after the other issues had been settled. This issue will only be settled after the settlement of all issues. The applicants say that the arbitrator should have decided rather than postpone this issue.

The respondents' counsel submitted that the defects were not an issue at all. She submitted further that at all times the applicants had retained 5% of the contract sum to cater for defect liability. It was a fact, counsel alleged, that the question of defect was not raised at all until the letter of demand by the respondents for the balance of the contract sum. The letters of defect were dated (i) 23 February 1987, (ii) 24 February 1987 and (iii) 27 February 1987 from three purchasers couched in the same terminology when the complaints of defects had passed the defect liability period.

Counsel for the appellants urged that the court may have the award remitted to the arbitrator if the court is satisfied that the arbitrator has misconducted himself. Applicants' counsel cited *Ong Guan Teck & Ors* v *Hijjas*,[1] where it was said that one of the grounds an award may be remitted was on the ground of misconduct of the arbitrator. In *Official Assignee* v *Chartered Industries of Singapore Ltd*,[2] it was said that misconduct occurs when the arbitrator fails to decide all matters which were referred to him. Although it was not a ground of counsel's submission, he also cited that an award may be invalidated if the effect of the award results in uncertainties. He cited *Tan Toi Lan* v *Lai Kee Ying*.[3] As the application was that the said arbitrator did not decide, I did not think the case was relevant.

After hearing argument by the parties and the authorities cited, I find that the application lacked merit. I did not find that the arbitrator has misconducted himself, ie has failed to decide all issues referred to him as alleged.

On the issue of letter of indemnity, I am of the view that the arbitrator did not relieve the respondents from having to give a letter of indemnity. My finding is based on the consultant's letter dated 20 November 1985, exh A in encl 7, in which the consultant wrote:

> (ii) For RC structures (eg footings, ground beams) already cast with mild steel bars for diameters ½ in and larger, you are required to give an undertaking ... for any structural damage due to under reinforcement of structures completed up to 19 November 1985.
>
> (iii) There is no objection to the use of round bars for diameters ½ in and larger provided you increase the reinforcement area to provide the equivalent strength. Therefore, it is necessary that you revise the structural drawings to indicate the equivalent strength enclosing a chart table for us to check.

I found that the provision of a perpetual indemnity was not a term of the contract. The arbitrator seems to have adopted the attitude that the building work can be continued by using a substitute of mild tensile bars but suitably reinforced and such substitution be incorporated in a revised plan to be certified by a consultant engineer. The applicants never insisted that the substitution be subject to terms and conditions that he be compensated for the price difference at the time of this substitution. As submitted by counsel for the respondents by a letter dated 17 March 1986 there was no more insistence on an indemnity as the revised plan using mild tensile was endorsed by another consultant. As a matter of fact, it was not disputed that the respondents did provide a letter of indemnity for 12 months from 5 June 1987 to cover the defect liability period of 12 months when the certificate of fitness was issued on 30 January 1987. In the face of these facts, I am of the view that the arbitrator was correct in deciding that the letter of indemnity was not required as the consultant engineer did not object to such substitution.

As to the second ground of price difference, the arbitrator at p 5 of the exhibit attached to encl 4 says:

> The architect had not commented on whether the employer would be given the benefit of cost saving should the substitution of steel bars be allowed nor on the other hand had the employer asked the employee for any discount in his agreed terms. Also the employee had not asked for any increase in price (in most circumstances the contractor would not ask for increase though contractually he is entitled if he can show cause and if he gets the consent of the employer). As such it is fair for both parties that no claim for increase or decrease shall be allowed for both parties.

I also found that there was no misconduct on the part of the arbitrator on this issue. Since the applicants had not raised any objection on the substitution of mild steel bars through their consultant engineer, it was therefore no longer tenable to talk of price difference. Price difference could be a point of dispute if so made and condition imposed that the use of mild steel bars be made the subject of the payment of price difference. No such stand was initially taken by the applicants or consultant and I am of the view that the arbitrator was correct when he decided that there was no price difference in using the mild steel bars and reinforcing them to equivalent strength.

As regards the third point of contention that there was delay, it is not disputed that an award was made but the applicants alleged that there was no basis. I am of the view that the respondents' counsel has given reason for the arbitrator coming to such an award that the delay was explained due to inclement weather and the applicants' alteration of plan contributing to delay.

Then lastly, on the issue of defect, I am satisfied that the issue of defect is a non-issue before the said arbitrator since the contract sum of 5% has been retained by the applicants and the complaint of defects was well after the defect liability period.

I find substance in the submission of counsel for the respondents that the misconduct that may cause the matter to be remitted is when the arbitrator has failed to decide all issues referred. There is also substance in the contention of the respondents' counsel that it would appear that the applicants' application to have the matter remitted is to ask the arbitrator to reconsider when he had already considered and not that he had failed to decide. It is also said in *Ong Guan Teck & Ors* v *Hijjas*[1] that s 23 of the Arbitration Act confers a wide but limited discretion on the court to remit the award. Like all discretions it had to be judicially exercised. Before the court can remit to the arbitrator, it had to ask what was the balance of convenience. Apart from the merit already discussed the court also held that the balance of convenience was against the court giving an order remitting it to the arbitrator. Apart from the merit, to remit will cause hardship to the respondents and will drag this matter to no end. I considered that the arbitration was at the applicants' request and accepted by the respondents. They both agreed to a single arbitrator and the respondents even agreed that the cost and disbursement be paid solely by the respondents. In the parties' attempt to have the matter settled it was initially agreed that any undisputed sum, if such sum can be ascertained by the applicants, be paid to the respondents immediately leaving only such disputed sum to be paid to the applicants' solicitors for safekeeping until arbitration proceedings had been completed. Respondents' counsel commented on the action of the applicants that when a search was conducted it was revealed that the applicants had charged his property at around the time of the arbitration proceedings. As this matter had taken such a long time, if this matter was to be remitted, the respondents would only agree to it if the applicants could pay the sum claimed, $197,225.66, into court and the applicants could take all the time they required to have this matter resolved.

For the reasons given, I found that there is no merit to this application and I also hold that the balance of convenience lies in favour of my not remitting the award to the arbitrator. I therefore dismiss the application with costs to be taxed to the respondent.

Application dismissed.

Solicitors: *Tok & Co*; *Sze-Ping & Tay*.

Reported by *Ng Sheau Jiuan*